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Canadian Bankruptcy and Insolvency Act: "Alberta, Alberta, You're Still on My Mind"

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Basis Points

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Last year we reported (here) that Alberta's *Redwater Energy Corporation* decision signaled good news for lenders and noteholders secured by Alberta O&G assets because the federal Canadian Bankruptcy and Insolvency Act ("BIA") prevailed over conflicting provisions in the provincial regulations promulgated by the Alberta Energy Regulator ("AER"). Resolving the conflict in favor of federal law under the doctrine of paramountcy means that secured lenders' claims have priority over environmental clean-up costs because receivers and bankruptcy trustees cannot be held liable for the remediation costs resulting from abandoned and non-producing wells under the BIA.

We announced that the decision was a boon for Canadian O&G lenders, but our optimism was tempered by a great big *asterisk* because the decision remained subject to reversal on appeal, and the issue might not be settled "until the Canadian Supremes ultimately sing." As expected, the AER and the Orphan Well Association ("OWA"), a non-profit operating funded by industry levies under the delegated authority of the AER—and responsible for managing and remediating abandoned wells--appealed the *Redwater* decision. We also explained in our prior post that the AER didn't put all its eggs in one basket. In addition to the appeal, the AER revised its regulations to shift the economic risk of most non-producing well liabilities back to asset acquirers and, therefore, indirectly back to the secured creditors. The AER's Bulletin 2016-16 announced regulatory changes implementing heightened scrutiny of new license applications, allowing the AER to condition discretionary approval on case-specific license terms and thereby delay and reduce collateral monetization for secured lenders, assuming would-be license acquirers even obtain approval.

Nonetheless, and with apologies to Eric Clapton, the AER still "ain't had no loving such a great long time." Yesterday, the Alberta Court of Appeal upheld the lower court's decision in a 2-1 ruling), finding no error in the decision below. The Court affirmed that abandoned well liabilities imposed by provincial regulations on receivers and bankruptcy trustees are in operational conflict with BIA exemption provisions, and that the doctrine of paramountcy requires the courts to uphold federal over state law. Appellants argued, among other things, that the lower court's decision would incentivize corporations to commence insolvency proceedings "merely for the purpose of avoiding environmental liabilities," but the Court of Appeals cited the Supreme Court in *Abitibibowater*, calling such fears "exaggerated" because "bankruptcy or insolvency are not easy solutions to financial problems and . . . there is enough judicial discretion in the insolvency regime to prevent abuses."

While the dissent decried shifting the burden of remediation costs to landowners and the OWA, the decision still stands, for now. The curtain fell on the second act, but the Canadian Supremes have yet to sing—and we're all waiting with bated breath to see whether they carry the same tune—and whether the O&G solution still "fits 'em right."

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